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APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE CEMENT ANTITRUST LITIGATION
(MDL No. 296)

STATE OF ARIZONA, *et al.*,
Plaintiffs-Appellants,
vs.
IDEAL BASIC INDUSTRIES, *et al.*,
Defendants-Appellees.

No. 81-5481

STATE OF ARIZONA, *et al.*,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,
and
KAISER CEMENT AND GYPSUM CORPORATION, *et al.*,
Real Parties in Interest.

No. 81-7465

STATE OF ARIZONA, *et al.*,
Petitioners,
vs.
ASH GROVE CEMENT COMPANY, *et al.*,
Respondents.

No. 81-8079

OPINION

BEFORE: WALLACE, SKOPIL, and BOOCHEVER, Circuit Judges.

WALLACE, Circuit Judge:

Plaintiffs, appellants and petitioners herein, seek review of the district court's order of May 26, 1981, granting a motion to recuse brought by defendants, appellees and real parties herein. Three avenues are attempted: a direct appeal under 28 U.S.C. § 1291, a discretionary interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and a petition for a writ of mandamus. Defendants move to dismiss the appeal on the ground that a grant of a motion to recuse is not a final appealable order subject to review under 28 U.S.C. § 1291, and argue that an interlocutory appeal under section 1292(b) is not warranted. We dismiss the appeal for lack of jurisdiction and deny the petition for permission to appeal pursuant to section 1292(b). Review will be based upon the petition for mandamus.

I.

Plaintiffs, a national class of public and private purchasers of cement and cement-containing products, and two statewide classes of governmental purchasers, assert a nationwide conspiracy among various cement producers to fix, maintain and stabilize the price of cement and cement products in violation of, *inter alia*, Section 1 of the Sherman Act, 15 U.S.C. § 1. The original suit was filed in the District of Arizona in 1976. Similar actions, which were filed in other parts of the country, were thereafter transferred by the Judicial Panel on Multi-District Litigation to the District of Arizona for consolidated pretrial proceedings. Because of his experience with the pretrial proceedings that had already been conducted in the actions pending in the District of Arizona, Judge Muecke was assigned to hear the coordinated or consolidated pretrial proceedings. *In re Cement and Concrete Antitrust Litigation*, 437 F. Supp. 750, 753 (J.P.M.D.L. 1977).

On March 9, 1979, Judge Muecke certified that the litigation proceed on behalf of a nationwide class of public and private cement purchasers and two statewide governmental entity classes. Following certification of these classes, the parties lodged with the court a Master Class List of 210,235

entities, consisting of all putative class members who could be ascertained through reasonable efforts. On January 12, 1981, after Judge Muecke had approved the list and had given notice to the putative class members, pursuant to Fed. R. Civ. P. 23(c)(2), that they could elect exclusion from the class by written request prior to December 31, 1980, defendants informed Judge Muecke in a letter that a comparison of his 1980 financial disclosure statement with the Master Class List indicated that his wife owned stock in seven of the 210,235 entities, none of which had requested exclusion. Defendants asserted that such stock ownership constituted interests both in parties to the litigation and in the subject matter of the litigation, thereby mandating Judge Muecke's recusal under 28 U.S.C. § 455(b)(4).[1] On February 23, 1981, defendants filed a motion for Judge Muecke's disqualification on the grounds asserted in their previous letter. Judge Muecke granted defendants' motion to recuse on the basis that his wife's stock ownership fell within the *per se* rule of 28 U.S.C. § 455(b)(4), which requires recusal when a judge's spouse has a financial interest in a party to the proceeding. *In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076 (D. Ariz. 1981).[2] On June 3, 1981, Judge Muecke certified his order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

II.

The first question we must decide is whether a party may take an appeal, pursuant to 28 U.S.C. § 1291, from an order granting a motion to recuse. Under section 1291, the courts of appeals are vested with "jurisdiction of appeals from all final decisions of the district courts. . . ." The Supreme Court has consistently interpreted this language as indicating that a party may not take an appeal under this section until there has been a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 467 (1978) *(Coopers & Lybrand), quoting Catlin* v. *United States,* 324 U.S. 229, 233 (1945). An order granting a motion to recuse clearly does not terminate the entire litigation.[3] "Such an order is appealable, therefore, only if it comes within an appropriate exception to the final-judgment rule." *Coopers & Lybrand, supra,* 437 U.S. at 467. In this case, plaintiffs rely on

the "collateral order" exception articulated by the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) *(Cohen)*.

In *Cohen* the Supreme Court recognized that some orders by their nature require review at an earlier stage, because they will be effectively unreviewable upon appeal from a final judgment. *Id.* at 546. The *Cohen* collateral order doctrine allows appeals from orders that can be said to fall within

> that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. Although there is a strong policy behind the rule that appeals are to be made only following final judgment on the merits, the Court has recognized that under certain circumstances "a rigid insistence on technical finality would sometimes conflict with the purposes of the statute." *Coopers & Lybrand, supra,* 437 U.S. at 471. Recently, the Court summarized the *Cohen* standard in the following manner:

> "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."

Firestone Tire & Rubber Co. v. *Risjord,* 449 U.S. 368, 375 (1981), *quoting Coopers & Lybrand, supra,* 437 U.S. at 468.

Firestone also stressed that the *Cohen* exception is narrow and teaches that "interlocutory orders are not appealable 'on the mere ground that they may be erroneous.'" *Id.* at 378. Thus, in determining whether a district court's order granting a motion to recuse is appealable prior to final judgment, we must be aware not only of the practical effect of denying immediate review upon a particular party, but also of the potential "unjustified waste of scarce judicial resources" which can result if the limited exception carved out in *Cohen* is transformed "into a license for broad disregard of the finality rule imposed by Congress in § 1291." *Firestone Tire & Rubber Co.* v. *Risjord, supra,* 449 U.S. at 378.

Plaintiffs argue that an order granting recusal is appealable under *Cohen*. Applying the standard as summarized by the Court in *Firestone, id.* at 375, we cannot disagree that an order granting recusal conclusively determines a disputed question, completely separate from the merits of the action, which, if not reviewed immediately, will be effectively unreviewable on appeal from final judgment. *Cf. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* Nos. 80-5970 *et seq.*, slip op. 5155 (9th Cir. Oct. 13, 1981) (allowing appeal from order disqualifying counsel under *Cohen)*. However, not all orders which meet the requirements of this standard are reviewable under section 1291. The Court in *Cohen* spoke of that small class of orders which finally determine "claims of right." More recently the Court has explained that in the situations in which *Cohen* has been applied, "each involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial." *United States* v. *MacDonald,* 435 U.S. 850, 860 (1978) (footnote omitted). Thus, criminal defendants have been permitted appeals prior to criminal trials when they claim a violation of the double jeopardy clause, *Abney* v. *United States,* 431 U.S. 651, 662 (1977), or a violation of their statutory and constitutional right to bail, *Stack* v. *Boyle,* 342 U.S. 1, 6 (1951). In these situations, like the posting of security for costs involved in *Cohen,* the party seeking immediate review can establish not only that the district court's order is effectively unreviewable on appeal, but also that the effect of an erroneous decision by the district court will deprive him of some protectable interest. *See Firestone Tire & Rubber Co.* v. *Risjord, supra,* 449 U.S. at 376-77. The rights sought to be vindicated by an immediate appeal would be extinguished by the time a final judgment is entered. Since the Supreme Court has recently cautioned that the final judgment rule and the important policies which support it must not be eroded by an unnecessarily liberal application of the *Cohen* exception, we are convinced that the "claim of right" language used in *Cohen* and reiterated by the Court on subsequent occasions must be viewed as establishing a mandatory prerequisite for a *Cohen* collateral order. *See Community Broadcasting of Boston, Inc.* v. *FCC,* 546 F.2d 1022, 1028 (D.C. Cir. 1976). It is this threshold requirement that plaintiffs in the present case have failed to meet.

In *Hampton* v. *City of Chicago*, 643 F.2d 478 (7th Cir. 1981), the Seventh Circuit considered the question of whether the erroneous grant of a motion to recuse deprives the litigant opposing the motion of any recognizable interest. In holding that it did not, the court stated: "[W]e fail to conceive of any interest which the plaintiffs have as litigants for review of [the] recusal order.... While plaintiffs have a right to have their claim heard by the district court, they have no protectable interest in the continued exercise of jurisdiction by a particular judge." *Id.* at 479. We agree.

Plaintiffs attempt to distinguish *Hampton* on two grounds. First, they argue that Judge Muecke's decision prevents any other federal judge from being assigned to hear the case and therefore denies them the right to have their case heard at all. In *Hampton*, reassignment of the case was routinely made by the clerk's office on a random basis. In contrast, reassignment of the instant case requires a concurrence of four of the seven judges on the Judicial Panel of Multi-District Litigation. Plaintiffs claim that because five of the seven members of the Panel own stock in putative class members, the Panel cannot act to assign the cases to a new judge or remand them to the districts where they were originally filed. Even the court in *Hampton* suggested that a consequence such as that asserted by plaintiffs might satisfy the "claim of right" requirement of *Cohen*. *Id.* at 479 & n.2.

We need not decide this question since we opine that stock ownership in putative class members by judges on the Judicial Panel on Multi-District Litigation does not affect the Panel's ability to transfer the present proceedings to a new judge. 28 U.S.C. § 455(b)(4) requires only that a judge disqualify himself in any "proceeding" where he has a financial interest in the subject matter in controversy or in a party to that proceeding. Section 455(d)(1) defines the word "proceeding" as including "pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. § 455(d)(1). Although the reassignment by the Panel could be construed as a pretrial stage of litigation, in light of the obvious purpose of section 455 to prevent a judge from adjudicating rights in any case in which he appears to have an interest, we refuse to construe the word "proceeding"

to include the performance of ministerial duties such as assigning a case to another judge. *See Stringer* v. *United States,* 233 F.2d 947, 948 (9th Cir. 1956). While the issue may be ultimately decided if and when the question is presented directly to the Panel, we conclude that the contention is of insufficient merit to persuade us that plaintiffs' fear of never having their case heard is well founded.

Plaintiffs also assert that the present case differs from *Hampton* because of Judge Muecke's four-year experience with the litigation. In *Hampton* the recusal order came immediately after the judge was assigned to the case and before he had gained substantial experience with the litigation or made any substantive orders. *Hampton* v. *City of Chicago, supra,* 643 F.2d at 479-80. Judge Muecke, on the other hand, had made numerous pretrial orders and secured a working knowledge of the suit during his four-year tenure. Plaintiffs essentially argue that although a litigant does not have a right to have a particular judge hear his case, a litigant does have a protectable interest in not having a judge disqualify himself unnecessarily when a recusal order would so disrupt the course of the litigation as to cause substantial delay. However, plaintiffs have failed to demonstrate how Judge Muecke's recusal would substantially delay the present litigation. Plaintiffs merely speculate that because the pretrial proceedings have taken over five years, the time required for a new judge to familiarize himself with the case will be substantial and thus deny them their right to a speedy and inexpensive adjudication of their claims. While plaintiffs' assessment of Judge Muecke's effective service should not be minimized, we should not rule out the possibility that the next judge selected by the Multi-District Panel may be even more familiar with the substantive issues of the litigation, which are as yet essentially undecided, or be aware of different pretrial or trial techniques. Thus, the ultimate disposition of this case may not be appreciably delayed at all.

There is another, more fundamental reason that we cannot accept plaintiffs' argument. There may well be exceptional situations in which the costs of familiarizing a new judge, in terms of delay, will prove to be very great. However, there will also be situations in which, although the original judge's

participation greatly exceeds that of the judge in *Hampton*, the effect of recusal on the course of litigation will be nonexistent or insignificant. It is not necessary to create a general rule permitting immediate appeal of all recusal decisions in order to resolve the exceptional situations. *See Firestone Tire & Rubber Co.* v. *Risjord, supra,* 449 U.S. at 378 n.13. Ultimately, if dissatisfied with the district judge's decision and confident that the litigation will be greatly disrupted, a party may seek a writ of mandamus from the court of appeals. It is for just such an exceptional circumstance that the writ was designed. *See Community Broadcasting of Boston, Inc.* v. *FCC, supra,* 546 F.2d at 1028. Plaintiffs have done so here and that petition will be reviewed on the merits.

III.

Plaintiffs have also applied to us for permission to appeal the district court's order pursuant to 28 U.S.C. § 1292(b).[4] Section 1292(b) provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals. Whether an order of judicial recusal is properly appealable under section 1292(b) is a question of first impression in our circuit. Our analysis must begin by examining the statute and its legislative history.

When a party seeks a section 1292(b) interlocutory appeal, the court of appeals must undertake a two-step analysis. First, we must determine whether the district court has properly found that the certification requirements of the statute have been met. These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction. In the present case, it is not necessary to discuss how this second determination is made, as we have concluded that the question whether 28 U.S.C. § 455(b)(4) compels Judge

Muecke's disqualification is not a "controlling question of law," and therefore the jurisdictional prerequisites for section 1292(b) review have not been met.

While Congress did not specifically define what it meant by "controlling," the legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. *United States Rubber Co.* v. *Wright,* 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); *Millbert* v. *Bison Laboratories,* 260 F.2d 431, 433-35 (3d Cir. 1958). Although some circuits have criticized such a narrow approach to interlocutory appeals, *see, e.g., Hadjipateras* v. *Pacifica, S.A.,* 290 F.2d 697, 702-03 (5th Cir. 1961), recently the Supreme Court in *Coopers & Lybrand* indicated its approval of the "exceptional circumstances" standard of section 1292(b) when it stated that the appellant "still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand, supra,* 437 U.S. at 475, *quoting Fisons, Ltd.* v. *United States,* 458 F.2d 1241, 1248 (7th Cir.), *cert. denied,* 405 U.S. 1041 (1972).

Keeping in mind this "exceptional circumstances" standard, we now must decide what Congress meant by the expression "controlling question of law." Courts have refused to interpret the phrase so narrowly as to require that reversal of the district court's order terminate the litigation. *See e.g., United States* v. *Woodbury,* 263 F.2d 784, 787 (9th Cir. 1959). One court has stated that, at the very least, a controlling question of law must encompass "every order which, if erroneous, would be reversible error on final appeal." *Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 755 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974). However, this latter standard is of little guidance in the present case since the erroneous granting of a motion to recuse could not constitute reversible error upon a final appeal. Quite to the contrary, after the litigation has been tried before an impartial judge, the recusal order of the former judge is effectively mooted.

Just because an erroneous recusal order would not constitute reversible error on final appeal does not preclude it from

review under section 1292(b). Rather, all that must be shown in order for a question to be "controlling" is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court. *See United States Rubber Co.* v. *Wright, supra,* 359 F.2d at 785. In discussing the "controlling question of law" requirement in *United States* v. *Woodbury,* we stated:

> In our view the question of privilege which the government now would have us review involves nothing as fundamental as the determination of who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law should be applied.
>
> The issues of this lawsuit and the ability of the court to render a binding decision therein are in no way affected by the order to produce documents. . . .
>
> . . . .
>
> In our opinion the claim of privilege here asserted is *collateral to the basic issues of this case,* and cannot be regarded as presenting a "controlling question of law" as those words are used in the statute.

263 F.2d at 787-88 (emphasis added). The question whether Judge Muecke erroneously disqualified himself under 28 U.S.C. § 455(b)(4) must be viewed as collateral to the basic issues of this lawsuit.

Furthermore, Judge Muecke's recusal order will neither affect the ability of the district court to render a binding decision nor materially affect the outcome of the litigation in the district court. At best, all that can be said is that if the recusal decision was erroneous and can be overturned immediately upon appeal, some time at the district court level may ultimately be saved. This assumes, of course, that it would take less time for the parties to appeal the recusal order than it would to familiarize a new judge with the litigation. If so, that would not materially affect the outcome of this litigation, but only its duration. Some courts have adopted the view that a question is controlling if it is one the resolution of which may appreciably shorten the time, effort, or expense of conducting a lawsuit, *see Katz* v. *Carte Blanche Corp., supra,* 496 F.2d at 755-56; *Hadjipateras* v. *Pacifica, S.A., supra,* 290 F.2d at 702;

E.F. Hutton & Co. v. *Brown*, 305 F. Supp. 371, 403 (S.D. Tex. 1969), thus essentially reading the "controlling question of law" requirement out of section 1292(b). We reject this approach. Congress could easily have chosen only to require that a question materially advance the litigation in order for it to be immediately reviewable. Since Congress chose to add the additional requirement that the issue for which review is sought must be a "controlling question of law," it would be improper for us to construe the statute as though these two requirements were interchangeable.

In conclusion, it is difficult for us to think of a question which is more separable from and collateral to the merits of this lawsuit than is the question of Judge Muecke's recusal decision. Since an appellate decision that recusal was improper could in no way materially affect the eventual outcome of the litigation, we cannot view the question as controlling. The precedent in this circuit has recognized the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases, and that the "controlling question of law" requirement be interpreted in such a way to implement this policy. *See, e.g., Robbins Constr. Co.* v. *Lawrence Mfg. Co.*, 482 F.2d 426, 429 (9th Cir. 1973); *United States Rubber Co.* v. *Wright, supra*, 359 F.2d at 785. Such precedent prohibits us from disregarding the "controlling question of law" requirement in the statute despite the fact that judicial resources might be saved by doing so. We admit that our adherence to precedent may mean that the important question of the applicability of 28 U.S.C. § 455(b)(4) to class actions will not be subject to direct appellate review, at least in the case where the district court grants the motion to recuse, and will require the parties to challenge the decision, as was done here, by a petition for writ of mandamus. However, Congress must have been aware of this possibility when it enacted the *per se* stock ownership rules of 28 U.S.C. § 455(b)(4). It is for Congress to decide whether this question is so important that direct appellate review must always be available.

APPEAL DISMISSED; PETITION TO APPEAL INTERLOCUTORY ORDER DENIED; PETITION FOR WRIT OF MANDAMUS TO BE HEARD ON THE MERITS.

FOOTNOTES

1. Under 28 U.S.C. § 455(b)(4), a judge must disqualify himself where:

> He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

2. Judge Muecke also ruled that Canon 3C(1)(c) of the Code of Judicial Conduct, which is identical to 28 U.S.C. § 455(b)(4), also imposed a *per se* obligation that he recuse himself. *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1079 (D. Ariz. 1981).

3. Apart from their *Cohen* argument, plaintiffs also assert that Judge Muecke's recusal order should be considered a final order and thus be reviewable under section 1291 since it deprives the plaintiffs of having their case heard at all. As we discuss in regard to the applicability of the collateral order doctrine, *see infra*, there is no merit to the argument that the recusal order effectively puts an end to the litigation on the basis that the Judicial Panel on Multi-District Litigation will be unable to reassign the case under 28 U.S.C. § 455(b)(4). Therefore, plaintiffs' argument that the recusal order in this case should be considered a final order must be rejected.

4. 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however,* That an application for an appeal hereunder shall not stay proceedings in the district court unless the district court or the Court of Appeals or a judge thereof shall so order.

BOOCHEVER, Circuit Judge dissenting:

I respectfully dissent. I think that Judge Muecke properly certified his recusal order, pursuant to 28 U.S.C. §1292(b), and that we should have accepted the interlocutory appeal. In addition, I think that an appeal pursuant to the "collateral order" exception to the final judgment rule, *see Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), would have been proper. The gist of the majority's opinion is that exercising jurisdiction over this interlocutory appeal would be improper because (1) Judge Muecke's recusal order does not present a "controlling question of law" and (2) plaintiffs assert no "claim of right" as required by *Cohen*. I find neither of these arguments convincing.

The majority states the issue before us too broadly, and, in doing so, confounds the application of both section 1292(b) and the collateral order doctrine. Stating the issue too broadly causes the majority to overstate the risk of rampant interlocutory appeals. As I see it, the issue is not whether *all* judicial recusals are open to interlocutory appeal. The issue is much narrower: is a judicial recusal order appealable either under section 1292(b) or *Cohen* when (1) it arises in a complex class action suit, (2) the judge bases his order upon a technical and literal reading of 28 U.S.C. § 455 even though he finds that he would neither be influenced by his spouse's minor stockholdings nor create the impression of impropriety by hearing the case, and (3) the judge recuses himself after presiding over the case for several years under circumstances requiring a new judge to expend substantial time and effort to become familiar with the case? I answer this question in the affirmative.

A. Section 1292(b)

We must conduct a two-step analysis when a party seeks a section 1292(b) appeal from a certified order. We must first determine whether the order certified for appeal meets the statute's threefold certification requirements.[1] If we find the order certifiable, we must then decide whether we want to accept jurisdiction. The majority concludes that Judge Muecke

[1] These requirements are set forth in the text of 28 U.S.C. § 1292(b), which appears at note 4 of the majority's opinion.

erred in certifying his recusal order because the recusal issue was not a "controlling question of law;" it, therefore, never reaches the second step of the analysis. I disagree with the majority's reasoning, and believe that we should accept jurisdiction.

Judge Muecke's recusal order meets all of section 1292(b)'s certification requirements. Two are clearly satisfied. First, an immediate appeal from Judge Muecke's recusal order might materially advance the ultimate termination of this litigation. Judge Muecke has warned of the delay he foresees if another judge is required to preside over this litigation. Second, this appeal involves an issue over which reasonable judges might differ. As Judge Muecke suggests, Congress may not have contemplated the application of 28 U.S.C. § 455 to class action litigation. This uncertainty provides a credible basis for a difference of opinion regarding section 455's applicability to class action suits.

Finally, I think the certified recusal order presents a "controlling question of law." Judge Muecke's recusal order presents a question of law; whether that question is "controlling" is the difficult issue. Because Congress did not explain what it meant by "controlling," we must construe that requirement in light of congressional purposes underlying section 1292(b)'s adoption—saving time for the district court and for the litigants while protecting against undue proliferation of appeals. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961). The Third Circuit found testimony in section 1292(b)'s legislative history indicating that " 'controlling' means serious to the conduct of the litigation, either practically or legally." *Katz*, 496 F.2d at 755. The Second Circuit has remarked that "controlling questions of law" may include "procedural determination[s] that may importantly affect the conduct of an action." *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (Friendly, J.). Several commentators have adopted similar interpretations. *See* Note, Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b), 88 Harv.L.Rev. 607, 623 (1975); 16 C. Wright & A. Miller, Federal Practice

and Procedure § 3930, at 169; 9 Moore, Federal Practice, ¶ 110.22[2], at 260 (2d.ed. 1975) ("The critical requirement is that it [the question] have the potential for substantially accelerating the disposition of the litigation."). I agree with these interpretations of the "controlling question" requirement. So defined, it is abundantly clear that this case presents a "controlling question of law."

There can be no doubt but that Judge Muecke's recusal order would importantly affect the conduct of this action. During the five years he presided over this case, Judge Muecke devoted numerous hours to pleadings, hearings, and other procedural matters. He has made numerous decisions that have affected the scope and character of the suit. He shares an intimacy with this litigation that would take another judge much time and effort to acquire. He warns of the delay and injustice that will occur if another judge is required to familiarize himself with this case:

> To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay. Decisions which might routinely be disposed of by me may well take a new judge longer until he has the opportunity to become acquainted with the case.

In re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1077, 1081 (D. Ariz. 1981). We should not take these admonitions lightly, as Judge Muecke is in a far better position than we to evaluate the probability and effects of delay. With this in mind, I would hold that Judge Muecke did not err in certifying his recusal order for section 1292(b) review.

Finding us empowered to assert jurisdiction over this appeal, I would then rule that we *should* hear its merits. In exercising our discretion to accept or reject certified orders for interlocutory appeal, we must be guided by the policies and concerns that motivated Congress to adopt section 1292(b). Congress intended to create a mechanism that would shorten the period between the commencement of an action and its ultimate termination and would avert unnecessary work and expense. *See* Appeals from Interlocutory Orders and Confinement in Jail-Type Institutions: Hearings on H.R. 6238 and

H.R. 7260 before Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 2d Sess., at 14 (1958). *See also Katz.* 496 F.2d at 753-56. It placed this mechanism under "the immediate, sole, and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided." *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d at 702-03. In doing so, it has entrusted the judiciary with the responsibility of developing an interlocutory appellate procedure in light of its own perceptions of need and its ability to control a potentially explosive source of appeals. Congress instituted a guard against the proliferation of interlocutory appeals by requiring that district courts certify their orders pursuant to stated criteria as a prerequisite to section 1292(b) appeals, and by further making such appeals subject to our acceptance.

I believe that the issue in this case warrants review at this interlocutory stage. The criteria for district court certification have been established. The narrowness of the issue before us obviates the risk of establishing precedent that might open the floodgates of interlocutory appeals. The importance of that issue and the impossibility of its later review dictate that we exercise our discretion by accepting this application for interlocutory appeal. *Cf. In re Virginia Electric & Power Co.*, 539 F.2d 357, 364 (4th Cir. 1976) (applying similar logic to justify interlocutory review of a judicial disqualification order).

B. Collateral Order Doctrine

I also disagree with the majority's conclusion that we cannot exercise jurisdiction over Judge Muecke's recusal order pursuant to the *Cohen* collateral order doctrine. To come within that doctrine "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The majority concedes that Judge Muecke's recusal order meets these requirements. It adds, however, that the collateral order doctrine is designed only to protect rights "the legal and practical value of which could be destroyed if... [they are] not vindicated before

trial." *United States* v. *MacDonald*, 435 U.S. 850, 859-60 (1978) (footnote omitted). It then argues that petitioners can assert no "claim of right," as required by *Cohen*, 337 U.S. at 546. That is, the parties can claim no right to have a particular judge hear their case. This argument ignores a significant plaintiffs' right. Plaintiffs are entitled to have their case proceed to trial without undue delay. *See generally* Fed.R.Civ.P. 1. This right is inarguably of "legal and practical value" and would seem to mount in importance as their case approaches trial.[2] Under the circumstances of this case an erroneously issued recusal order would infringe on this right by causing undue delay.[3]

Not only does the recusal order satisfy the judicially-fashioned requirements for collateral order appeals, its present review would also be consistent with the policies underlying the collateral order exception to the final judgment rule.[4] Because it recognized that the dangers of delaying review may occasionally exceed the risk, cost, and inconvenience of piecemeal review, the Court gives the finality requirement a "practical rather than a technical construction." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974), *quoting from Cohen*, 337 U.S. at 546. In the instant case, an appeal from Judge Muecke's recusal order would enable plaintiffs to obtain review of a question that would otherwise escape review. Just as important, review of the recusal order would not radically disserve any of the policies that the final judgment rule was designed to protect. A major risk of piecemeal review—disruption of the trial court proceedings—has already occurred in this case. Hearing this appeal would, at worst, only

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[2] Judge Muecke reported, in his recusal order, that, "[w]hile trial is not yet underway, discovery has been substantial and is nearing completion." 515 F.Supp. at 1077. After more than five years of pretrial proceedings, the parties have significantly neared trial.

[3] Of course there is a countervailing right in having a disinterested judge preside over this litigation. Concededly, this right supercedes the right to go to trial promptly. It is not clear whether Judge Muecke is to be considered disinterested. Consequently, the clash between plaintiffs' right to proceed promptly to trial and the defendants' interest in assuring that a disinterested judge preside over the case merely highlights the importance of having us review the recusal order to determine whether plaintiffs' right to a prompt trial must be compromised.

[4] The final judgment rule is set forth in 28 U.S.C. § 1291.

prolong the delay already injected into this proceeding.[5] Moreover, added delay in this case is justified because it would enable us to clarify the requirements of 28 U.S.C. § 455 and thereby potentially prevent unnecessary recusals that could cause delay in future cases. The instant case is one in which a practical construction of the finality rule is justified. I would allow a *Cohen* appeal.

To conclude, I think that the legal issue raised by Judge Muecke's recusal order is of major importance. It is likely to recur in future class action suits, where it will again affect the efficiency with which those cases proceed. Yet, because writs of mandamus will not issue unless the district court has committed "clear and indisputable" error, *see United States* v. *Mehrmanesh*, 652 F.2d 766, 770 (9th Cir. 1981); *Arthur Young & Co.* v. *United States District Court*, 549 F.2d 686, 691 (9th Cir.), *cert. denied*, 431 U.S. 829 (1977), confining our review of this issue to occasions when writs of mandamus are sought may effectively cause it to escape the type of review by which it may be decided solely on its merits.

I would accept this interlocutory appeal.[6]

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[5] If we were to hear this appeal and affirm the recusal order, we would effectively leave the case where it stood when it first came before us. Alternatively, if we found grounds to reverse, we could return the litigation to Judge Muecke and obviate the delay that will occur if another judge is appointed to preside over this litigation.

[6] I also disagree with the majority's thinking regarding the effect that stockholdings by members of the Judicial Panel on Multi-District Litigation will have on their qualification to reassign the case. In my opinion, the reasons that would preclude a judge from adjudicating the merits of a case are equally relevant in determining whether a judge should participate in the reassignment of a case. Although this issue is not one of controlling importance since temporary appointments to the panel could be made, *see* 28 U.S.C. § 1407(b) (authorizing Chief Justice of United States to designate judges to serve as Panel members "from time to time"), thereby enabling it to reassign the case, the need to empanel other judges would present the prospect of additional delay.

FILED
MAY 26, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ARIZONA

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION	MDL DOCKET NO. 296 MASTER FILE NO. CIV. 76-488A PHX CAM
THIS DOCUMENT RELATES TO: ALL ACTIONS	OPINION AND ORDER

This matter is before the Court on Motion to Recuse, pursuant to 28 U.S.C. § 455(b)(4) and Canon 3C(1)(c) of the Code of Judicial Conduct. I am asked to disqualify myself for the reason that my wife owns shares of stock in several members of the plaintiff class.

The present case is one of a growing number of very large antitrust class actions that have confronted the federal court system in recent years. The original suit was filed in this district in 1976. Similar actions which were filed in other parts of the country were thereafter transferred to this district by the Panel on Multidistrict Litigation. The subject matter of this case involves allegations of a nation-wide price fixing conspiracy in the cement industry. Plaintiffs are purchasers of cement or cement-containing products. In one way or another, *Cement* touches millions of people.

The history of Cement is long and complex. In the five years since it was filed, this Court has spent hundreds, if not thousands of hours reading and researching pleadings, conducting hearings, meeting with counsel, and issuing decisions. While trial is not yet underway, discovery has been substantial and is nearing completion.

In order to put defendants' motion in context, it is important to appreciate the size of the plaintiff classes. One of these classes, the National Cement Class, consists of more than 210,000 names, a substantial portion of which are corporate entities. The shareholders of these corporations would number in the millions. Before the present dispute, the class list existed only on microfiche and, to this Court's knowledge, had never been committed to hard copy.

On January 12, 1981, I received a letter from Mr. David Bonderman, on behalf of various *Cement* defendants. Mr. Bonderman advised the Court that, comparing the contents of my 1980 financial disclosure report with the names on the National Cement Class list, it appeared that my wife owned shares of stock in seven of the 210,000 class members. From this, Mr. Bonderman concluded that I was under a *per se* obligation to recuse myself pursuant to 28 U.S.C. § 455(b)(4) and Canon 3C(1)(c) of the Code of Judicial Conduct.

I must admit that my first reaction to Mr. Bonderman's position recalled the words of Mr. Bumble in Dickens' Oliver Twist: "If the law supposes that... the law is a ass—an idiot."[1] Upon closer review of the authority cited by Mr. Bonderman, however, it became apparent that his argument was not without support in the language of § 455 and Canon 3C. Therefore, on January 14, 1981, the Court ordered that plaintiffs be prepared to respond to the legal arguments raised in the letter at a hearing, which was set for Friday, January 30, 1981.

The Court's decision in this matter follows extensive briefing as ordered by the Court from the parties, oral argument on two occasions, and input from the Advisory Committee on

[1] *See also* George Chapman (1559-1634), *Revenge for Honour*, III.ii: "I am ashamed the law is such an ass."

Codes of Conduct of the Judicial Conference of the United States. I have concluded that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

28 U.S.C. § 455 and Canon 3C

The relevant language of § 455 and Canon 3C is identical:

> Any... judge... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> He shall *also* disqualify himself in the following circumstances:
>
> ...
>
> > He knows that he... or his spouse... has a *financial interest* in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding....
>
> For the purpose of this section the following words or phrases shall have the meaning indicated:
>
> ...
>
> > "*Financial interest*" means ownership of a legal or equitable interest, *however small*....
>
> (Emphasis added).

Defendants have taken the position that my wife's stock ownership in class members constitutes a "financial interest" in either the "subject matter in controversy" or in a "party to the proceeding."

Both of these arguments could be avoided if the words "any other interest that could be substantially affected by the outcome of the proceeding" could be read to modify a disqualifying "financial interest." If this were the case, a financial

interest in the "subject matter in controversy" or in "a party to the proceeding" would be disqualifying only if the interest was such that it could be "substantially affected by the outcome of the proceeding." Despite the logical attractiveness of such a reading, the only Circuit Court to have addressed the issue has rejected it:

> The statute differentiates between two kinds of interests. If the judge has a direct ownership, legal or equitable, then disqualification is required regardless of the size of the interest, unless one of the specified exceptions applies. On the other hand, an interest not entailing direct ownership falls under "other interest," and requires disqualification only if the litigation could substantially affect it.

In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 796 (10th Cir. 1980). *See also* Opinion of the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States, May 7, 1981 at 3, which is attached to this Opinion as Exhibit A and incorporated by reference herein.

The Advisory Committee's Opinion

Given the similarity between § 455 and Canon 3C, defendants' argument raises ethical as well as legal considerations: For this reason, all memoranda in this matter, filed in the Motion to Recuse, including a transcript of oral argument, were referred to the Advisory Committee on the Codes of Conduct with a request for an opinion, which request was first initiated by this Court to the Committee on January 29, 1981.

Upon due consideration of all materials that were provided to this Court, the Advisory Committee concluded that I should recuse myself. The Committee did not consider the first issue raised by defendants, whether my wife's stock ownership in a class member constituted a "financial interest in a *party* to the proceeding." While the Committee's opinion was not specific, it suggested the applicability of defendants' alternate arguments, that my wife's stock constitutes a "financial interest in the subject matter in controversy" or "any other interest that could be substantially affected by the outcome of the proceeding." In

recommending recusal, the Committee emphasized that ethical considerations require a judge to consider "possible and potential conflicts of interest as well as actual conflicts of interest." Advisory Opinion at 4. The Committee also suggested that any eventual judgment which would result in a financial benefit to a corporation in which my wife owned stock might create the appearance of impropriety. *See* Canon 2, Code of Conduct.

§ 455

Regardless of the applicability of § 455, this Court is very persuaded by the Advisory Committee's conclusions as to Canon 3C. Section 455 outlines the *legal* boundaries of when a judge must recuse himself. Canon 3C defines the ethical boundaries. Even if I could legally proceed with a case, I would refuse to do so if I were to determine that it was ethically improper.

Given that § 455 purports to adopt a *per se* rule regarding disqualification, it is amazing that the statute is not more specific as to when the *per se* rule would apply. The problems created by the language of § 455 are compounded by a dirth of legislative history on the questions before this Court. Section 455 might operate with some degree of success in the context of simple litigation. When applied to complex multidistrict class actions, however, the statute appears to break down.

The first question raised by defendants is whether the class members in whom my wife owns stock are "parties" within the meaning of § 455(b)(4). If they are, the statute commands my recusal "however small" my wife's interest in them might be.

Despite the proliferation of class-actions in this country, there is no indication that Congress directly considered the question whether "party" under (b)(4) should be read to include "class member."

The strongest points raised by plaintiffs are that the statutory language does not refer to class members, and that general law does not treat class members and parties in an

identical fashion. *See e.g. Greenfield* v. *Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973) (the purpose of class actions is to bind persons (class members) who are not "parties"); *Hawaii-Pac Venture Capital Corp.* v. *Rothbard*, 564 F.2d 1343 (9th Cir. 1977) (class members have no absolute right to intervene in class action).

The problem with plaintiffs' argument is that, *where it counts*, class members and parties are identical. There is no question that class members are included in the benefits and burdens of a judgment on an equal basis with parties. For this reason, there appears to be no reason in logic why a financial interest "however small" in a named party to a litigation should be grounds for recusal, but that the same interest in a class member should not be. Neither the degree of conflict, nor the appearance of impropriety is altered by a litigant's classification as "party" or "class member."

The second question raised by defendants is whether my wife's stock in class members constitutes a "financial interest" in the "subject matter in controversy." As noted above, neither the language nor the legislative history of § 455 provides much guidance as to the application of the statute to the instant situation. We know only that if my wife has such an interest, "however small," I must automatically recuse myself—even if it does not make practical sense to do so.

I find the term "subject matter in controversy" to be inherently vague. While it obviously applies to *in rem* proceedings, *see* Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, United States Senate, 93rd Congress, July 14, 1971, and May 17, 1973, Congress has not indicated whether it is limited to such proceedings and, if it is not, how far the term extends. Although the Fourth and Tenth Circuits have determined that a "remote, contingent benefit" is not a "financial interest" within the meaning of the statute, *see In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *In re Virginia Electric & Power Co.*, 539 F.2d 357 (4th Cir. 1976), I am directed to no federal decisions which contain any significant discussion on the particular issue involved here—the definition of "subject matter in controversy."

Fortunately, my conclusion that the "parties" provision of § 455 is applicable to the present case makes the resolution of the "subject matter in controversy" issue unnecessary.

Competing Considerations

As I have said, it is somewhat surprising that Congress did not consider the effect of § 455 on the administration of class action litigation. Not only has the class action become an increasingly common form of litigation in this country, the likelihood of § 455 applying in a class action, with its many "parties", is is much increased over simple litigation. This is aggravated when one considers that a party cannot waive the application of § 455, either voluntarily or by estoppel, and that § 455 demands disqualification no matter how small a judge's financial interest in the litigation might be.

My surprise at Congress' failure to consider the impact of § 455 on class action litigation is also occasioned by the fact that the administrative burden of applying the *per se* rule to class actions is greater than the burden of applying it to simple litigation. Given the number of participants in a large class action, it is not an easy matter to determine whether a *per se* conflict exists. In normal litigation, a judge can simply compare his families' holdings with the names on the caption to the complaint. In a complex multidistrict class action, the litigation may be well underway before a comprehensive class list can be compiled. To switch judges in mid-stream not only wastes judicial time and energy, but can constitute a substantial administrative burden. I question whether such a result should be occasioned *per se* "however small" a judge's financial interest. I also question whether the result should be the same regardless of the stage of the litigation, and regardless whether estoppel might otherwise apply.

The problems of applying § 455, as written, to large multidistrict class action litigation are demonstrated by application of the statute to *Cement.*

Consider the amount of money involved on the question whether a judge would be influenced by potential gain to himself or his family. As computed by plaintiffs, and not

contested by defendants, the *total* amount my wife could possibly be enriched by a ruling favorable to the plaintiffs (keeping in mind that a jury trial had been timely requested) is between $4.23 and $29.70. (See attached computations Exhibit B). Given the cost of educating a new judge, both to the parties and to the Government, this amount seems wholly inconsequential. In addition, consider that the stocks in question are my wife's sole and separate property, and whether Congress took community property concepts into account when imputing a spouse's interests to a judge. Finally, consider that judges are not even required to report gifts of less than $100 on the financial disclosure reports.* In the face of these facts, can it seriously be contended that my continuation in this matter creates the appearance of impropriety?

Compare my wife's financial interest in this litigation with the burden of applying § 455. As I have said, this case is into its sixth year. This Court has entered 75 pretrial orders, decided countless motions, and retains a working knowledge of where the suit has been and where it is headed. Such knowledge is crucial to competent case management. To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay. Decisions which might routinely be disposed of by me may well take a new judge longer until he has the opportunity to become acquainted with the case.[2]

This Court's observation that § 455 works anomalous results when a litigation is well under way has been noted by the Advisory Committee on Codes of Conduct and the Judicial Conference of the United States. In 1980, the Committee submitted the following draft legislation to the Conference, which would add a new subsection (f) to 28 U.S.C. § 455:

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* *But, see* Canon 5(C)(4)(c), Code of Judicial Conduct for United States Judges.

[2] Contributing considerably to a quick understanding of this case, is the high level of competence of the attorneys involved. This Court is deeply appreciative of the superb quality of the briefs and arguments presented by counsel, and it is a cause of personal regret that meetings with counsel will come to an end.

> (f) Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.

The Conference approved the foregoing, and authorized its transmission to Congress, where it is presently pending. Should Congress see fit to adopt the proposed subsection (f), many of the problems referred to in this decision would be remedied. Indeed, had proposed subsection (f) been in force today, this Court would have reached a different conclusion as to the necessity of disqualification under § 455.

Effect of Recusal on the Future of Cement

My reluctance to let this case go would be increased if I thought it would invalidate any of the action taken in this case in the past years. I am firmly convinced, however, that my past rulings will remain intact, and that the only effect will be administrative.

Despite its other possible shortcomings, § 455 does not require disqualification until a judge "knows" that he has a financial interest. Until he is so informed, how can there be a conflict? How can there even be the appearance of impropriety? More importantly, how can it be contended that his past decisions could be affected by a financial interest of which he was unaware?

Defendants have conceded that I was unaware that the companies in whom my wife held stock were class members. After all, the National Cement Class alone contains over 210,000 members, and the class list, which was on microfiche, was not provided to the Court until this dispute arose and the Court requested this list and it was provided in a printout four feet high. Since the Court became apprised of this problem, it has made no substantive rulings. Motions have been argued, but taken under advisement pending the Court's decision on recusal.

Given that "knowledge" of a financial interest in a class member cannot be discovered until the litigation has progressed to the point that it has produced a class list, to permit attacks on "pre-knowledge" rulings on the basis of a subsequent determination of interest would not only be illogical, it would constitute an intolerable burden to the administration of class action litigation.

In accordance with the above, I hereby recuse myself from further participation in the *Cement* portion of this litigation. Whether this ruling should also apply to the *Concrete* portion, which has not been raised in the Motion to Recuse, is a decision that should be made in light of the foregoing Opinion. This Court will entertain any proposals or motions that the parties believe appropriate.

This Court will also be in touch with the members of the Panel on Multidistrict Litigation who will determine the Court to which these proceedings will be transferred.

DATED this 26th day of May, 1981.

C. A. Muecke

C. A. Muecke, Chief Judge

EXHIBIT A

May 7, 1981

The Honorable C. A. Muecke
Chief Judge, U. S. District Court
United States Courthouse
Phoenix, Arizona 85025

Dear Judge Muecke:

Your inquiry to Judge Tamm of January 29, 1981 has recently been referred to the Advisory Committee on Codes of Conduct.

We understand your question arises by reason of your acting as presiding judge in a multidistrict class action which has been assigned to you. It involves allegations against numerous defendants by reason of a claimed nation-wide price fixing conspiracy. The case was brought by a large group of named plaintiffs in 1976. One of the alleged classes, known as National Cement Class, consists of over 210,000 names, almost all being corporate entities. The members of this class may have more than 10,000,000 individual shareholders. Defendants' counsel in a brief filed with you in support of their motion to recuse state that the action is against "virtually all of the national cement manufacturers."

It appears that you have been advised recently by counsel for certain named defendants that they have learned from your financial disclosure statements that either you or your wife is the owner of stock in nine members of the National Cement Class. None of the nine are named as party plaintiffs. Some documents indicate seven corporations. The number is immaterial.

You have advised that your wife does own stock in these companies through an inheritance from her mother; that the inheritance was received by her at about the time the suit was filed. You advise that the total value of the stock so held by your wife is approximately $50,000.

It further appears undisputed that these companies are members of the class referred to in the complaint as "National

Cement Class." It further appears that under the court's order any member of this class was permitted to opt out by December 31, 1980 and that none in which your wife was a shareholder did so. It follows that each of these corporations will be bound by the litigation assigned to you and will benefit from the litigation if a recovery is had.

We infer from your letter that the number of shares owned by your wife in the companies is not large and when considered in relation to the total number of shares outstanding in all nine companies may be de minimis. You have very frankly, and commendably, told us that the total value of the number of shares owned by her as it relates to your wife's total financial holdings makes it of substantial importance to her.

We first circumscribe the coverage of this opinion. This is not a case where the judge after he has spent weeks or months in a trial learns of the facts such as those which exist here. It is also not a case where during or following a long trial an attempt is made to bring in a party or parties, or create a situation, in order to disqualify the judge. This is not a case where any corporation has been added to the class in order to disqualify the judge. It is also likely, but we do not regard it as controlling in your reaching a decision, that at the time the suit was filed the grounds for the claim of disqualification were unknown to counsel and to the court.

While your letter raises indirectly the question of whether there is any judge or judge's spouse who does not have an interest in some Cement Class corporation similar to your wife's interest, we do not presently feel that that question is presented. If the multidistrict litigation committee should conclude that all federal judges available in the United States to hear the case have the same factual situation which exists in your family we will then meet that issue. We do not consider such a conclusion as a likelihood.

To review, we again mention certain undisputed facts. You are aware that your wife owns stock in a corporation or corporations which though not named parties to the lawsuit

before you will be bound by its results. It is certain that these corporations, if plaintiffs are successful in the suit, will benefit financially by the result. The extent of the benefit is presently undeterminable. It is presently unknown whether the financial benefits to your wife, if any, will be substantial or will be de minimis. We do know that your wife's total stock interest in certain corporations of the class is substantial to her.

The briefs submitted to you, copies of which you have so kindly furnished each member of the Committee, discuss whether or not your wife is a party to the litigation before you.

A majority of the Committee concludes that it does not need to reach that issue. The disqualification statute, 28 USC § 455, provides in (a)(4) that a judge shall also disqualify himself in the following circumstances:

> "He knows that . . . his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. . . ."

and in the definitions provides in (d)(4):

> " 'financial interest' means ownership of a legal or equitable interest, however small. . . ."

Whether the spouse is a party or not the judge should disqualify himself if the spouse has a financial interest, however small, in the subject matter in controversy or any other interest that could be substantially affected by the outcome of the proceeding. While the other interest must be one that could be substantially affected by the outcome of the proceeding the financial interest in the subject matter in controversy is not so limited.

There are other matters which you should consider also:

That judges must report gifts amounting to over $100. This may or may not have any bearing with you as to what is substantial.

That Resolution L adopted by the Judicial Conference of the United States in October, 1971 (see IV-27 Code of Judicial Conduct for United States Judges) indicated that all judges should consider not only actual, potential or probable conflicts of interest but possible conflicts as well. The effect of possible conflicts is emphasized in the statement that the frequent practice of a judge having to advise counsel of a possible conflict is fraught with potential coercive elements which make this practice undesirable. Under the resolution you should consider not only possible conflicts but potential conflicts as well. This may also make irrelevant the question of whether she or the corporations are actually parties. Possible and potential conflicts of interest as well as actual conflicts of interest are to be considered by a judge.

That Canon 3 disqualifies a judge who holds stock in a corporation which is a party to a lawsuit regardless of how large or small the financial interest may be. That Canon 3 also states in effect that a judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned, including instances where he knows that his spouse has "any other interest that could be substantially affected by the outcome of the proceeding".

That Canon 2 requires that a judge avoid not only impropriety but the appearance of impropriety as well. From the facts outlined by you you have knowledge of your wife's financial interest in certain of the class members. In Advisory Opinion 57 this Committee has previously suggested that the owner of stock in a parent corporation has a direct legal or equitable interest in a controlled subsidiary and where the judge knows that a party before him is controlled by a corporation in which he owns stock the judge should disqualify himself. In Advisory Opinion No. 27 it was held that although the judge's wife had no financial interest in a drug store defendant which was her lessee and which, with others, was a defendant in a class action case brought under the Sherman and Clayton Antitrust Acts and also under the antitrust laws of the

state that there could be an appearance of impropriety for the husband to hear the case. You must consider whether or not your inquiry presents in substance this question, to-wit: Could you say in good conscience, if you do not recuse and later enter a judgment in this case whereby one or more of the corporations in which your wife is a stockholder receive financial benefit, that it would not have the appearance of impropriety for you to have heard the case and entered such an order?

A majority of the members of the Committee conclude that you should recuse but we emphasize to you that the Committee's function is solely advisory. The final decision in this, as in other ethical situations, remains your individual responsibility.

For the Committee,

Howard T. Markey
Chairman

EXHIBIT B

QUANTIFICATION OF MRS. MUECKE'S INTEREST IN THE LITIGATION

The insubstantiality of the Court's "other" interest in this litigation is demonstrated by Table I, set forth below. These calculations are made with the following assumptions, all designed to unrealistically maximize Mrs. Muecke's recovery:

(1) Each of the nine entities which defendants claim provide the basis for recusal files a timely claim, for the full amount of purchases set forth in the compilation of defendants' interrogatory answers, and these claims are all approved for participation against the recovery herein. This assumption is unwarranted, since certain of the entities (e.g., American Can), apparently have a miniscule claim unlikely to warrant the effort.

(2) The approved plan of distribution provides for full weighting of claims of cement-containing products purchases with claims of cement, which are included in defendants' compilations of total purchases. (See, e.g., sales of ready-mix concrete to Carolina Power & Light by Gifford-Hill, as described in Gifford-Hill's responses to the Revised 15th Set of Interrogatories and included in defendants' compilations).

(3) The amount of recovery equals the total approved claims, such that for each $1.00 of approved purchases, the claimant receives $1.00 recovery, with the net result that all cement and cement-containing products have a net cost of zero. (By contrast, recoveries as a percentage of claimed amounts in other multidistrict antitrust actions have been less than 5%.)

(4) The nine class members pay no federal, state or local taxes on any recovery obtained.

(5) The entities in which Mrs. Muecke owns stock distribute their entire recovery to shareholders in the form of dividends. (This assumption also recognizes the increase in the corporations' total assets, which is presumably reflected in the price of their stock.)

(6) With respect to ITT, Minnesota Mining and Union Oil, the full amount of the recovery is transferred from the subsidiary (which is the class member) to the "parent" in which Mrs. Muecke owns stock, or, in the case of Union Electric, from the "agent" (which is the class member) to the "principal" in which she owns stock. This assumption is obviously extremely generous to defendants since, e.g., Minnesota Mining no longer owns the subsidiary accounting for over 97% of its total "claim", and ITT no longer owns the two subsidiaries accounting for over 99% of its total "claim".

Nonetheless, employing all of these unlikely assumptions, the total benefit to Mrs. Muecke would be less than $29.70. By discarding assumption (6), above, her total benefit (either by dividends or pro-rata increase of total assets) would be less than $4.23.

TABLE I

Calculations of Mrs. Muecke's Share of 100% Recovery (Ignoring Corporate Income Tax)

	(a) Shares Mrs. Muecke Owns	(b) Total Shares Out-Standing	(c) Total Cement or Cement-Containing Products Purchases and Assumed 100% Recovery	(d) Mrs. Muecke's Share of 100% Recovery
American Can Co.	125	19,327,543	$ 244.23	$ .00158
Carolina P.&L.	150	45,886,288	261,976.71	.85639
Continental Oil Co.	200	107,673,296	15,518.45	.02883
Potomac Electric Power Co.	150	41,658,461	929,730.68	3.34768
Peoples Energy Corp.	100	26,753,459	15,261.68	.05705
Excluding Subsidiaries			594.68	.00222
Union Electric Co.	100	58,796,909	594,203.96	1.01060
Excluding Agents			-0-	-0-
Union Oil	200	173,288,776	19,945,245.96	23.01960
Excluding Subsidiaries			-0-	-0-
3M	50	117,296,499	1,041,568.83	.44399
Excluding Former Subsidiaries			31,047.91	.01323
Excluding All Subsidiaries			-0-	-0-
ITT	200	115,780,173	537,881.57	.92914
Excluding Former Subsidiaries			13.50	.00002
Excluding All Subsidiaries			-0-	-0-
Total Including All Subsidiaries And Agents	1,275	706,461,404	23,347,632.07	$29.69486
Total Excluding Former Subsidiaries			21,799,243.08	$28.33498
Total Excluding All Subsidiaries and Agents			1,214,064.75	$ 4.23670

Notes:

(a) See Court's Exhibit A, distributed at January 30, 1981 hearing.

(b) As of 12/31/79, except for Peoples Energy Corp., which is as of 9/30/79. Source: Standard & Poor's.

(c) As reflected in Defendants' "Summary of Sales Set Forth in Interrogatory Answers" (filed March 5, 1981).

(d) Entries in this column are the result of dividing the column (a) entry for the entity in which Mrs. Muecke owns stock by the corresponding column (b) entry, and multiplying the result by the column (c) entry on the appropriate line.

LODGED
MAY 29 1981
OFFICE OF THE CLERK
U.S. DISTRICT COURT
DISTRICT OF ARIZONA

FILED
JUN 3 1981
W. J. PURSTENAU
CLERK
UNITED STATES
DISTRICT COURT
FOR THE DISTRICT
OF ARIZONA
By .....
DEPUTY CLERK

IN THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF ARIZONA

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION	MDL DOCKET NO. 296 MASTER FILE NO. CIV. 76-488A PHX CAM

PRETRIAL ORDER NO. 77

Re: Certification of Interlocutory Appeal

This Court having issued its opinion and order dated May 26, 1981, and plaintiffs having made a motion in open Court during the regularly scheduled pretrial conference on May 26, 1981, for the certification of this opinion and order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and good cause appearing therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiffs' motion is granted and that this Court's opinion and order dated May 26, 1981, be and it is hereby amended by the addition of the following:

THIS COURT FINDS AND DETERMINES that its May 26, 1981, opinion and order regarding 28 U.S.C. § 455 involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from that opinion and order may materially advance the ultimate determination of the litigation and that opinion and order is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

DONE IN OPEN COURT this 3rd day of June 1981.

C. A. Muecke

C. A. MUECKE
United States District Judge

APPROVED AS TO FORM:

Kenneth R. Reed

KENNETH R. REED
Liaison Counsel for plaintiffs
on behalf of plaintiffs

William J. Maledon

WILLIAM J. MALEDON
Liaison counsel for defendants
listed on Exhibit "D"

George Read Carlock

GEORGE READ CARLOCK
Liaison counsel for defendants
listed on Exhibit "E"

Philip E. von Ammon

PHILIP E. VON AMMON
Liaison counsel for defendants
listed on Exhibit "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CEMENT ANTITRUST LITIGATION
(MDL No. 296)

STATE OF ARIZONA, *et al.*, *Plaintiffs/ Appellants,* vs. IDEAL BASIC INDUSTRIES, *et al.*, *Defendants/ Appellees.*	81-5481
STATE OF ARIZONA, *et al.*, *Petitioners,* vs. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Respondent,* and KAISER CEMENT AND GYPSUM CORPORATION, *et al.*, *Real Parties in Interest.*	81-7465
STATE OF ARIZONA, *et al.*, *Petitioners,* vs. ASH GROVE CEMENT COMPANY, *et al.*, *Respondents.*	81-8079 ORDER

BEFORE: WALLACE, SKOPIL and BOOCHEVER, Circuit Judges

This matter comes before the Court on petitions to permit an appeal under 28 U.S.C. § 1292(b) from the opinion and order of Judge Carl A. Muecke entered May 26, 1981 and modified on June 3, 1981 recusing himself from all future proceedings in the class action litigation in *In Re Cement and Concrete Antitrust Litigation;* and for a writ of mandamus to vacate that order. Additionally, petitioners have filed a direct appeal (No. 81-5481) and have moved for relief from compliance with Fed. R. App. P. 21 and 25 and 9th Cir. R. 13(e). Respondents have moved to dismiss appeal No. 81-5481.

The clerk shall calendar the mandamus petition for oral argument on the first available hearing date. The opposition to the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) shall be treated as the response to the petition for mandamus. This order is without prejudice to further briefing being requested by the merits panel.

The motion to dismiss appeal No. 81-5481 is granted because a recusal order is not a final judgment or an order of the type from which a direct appeal may be taken under *Cohen* v. *Beneficial Industries Loan Corp.*, 337 U.S. 541, 546 (1949).

Permission to appeal under 28 U.S.C. § 1292(b) is denied. The motion for relief from compliance with Fed. R. App. P. 21 and 25 and 9th Cir. R. 13(e) is granted.

Judge Boochever would grant permission to appeal under 28 U.S.C. § 1292(b) but because no such permission has been granted concurs in the remainder of the order.

FILED
NOV 19 1981
CLERK, U.S.
COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CEMENT ANTITRUST LITIGATION
(MDL No. 296)

STATE OF ARIZONA, *Plaintiffs/Appellants,* vs. IDEAL BASIC INDUSTRIES, *et al.*, *Defendants/Appellees.*	No. 81-5481
STATE OF ARIZONA, *et al.*, *Petitioners,* vs. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Respondent,* and KAISER CEMENT AND GYPSUM CORPORATION, *et al.*, *Real Parties in Interest.*	No. 81-7465 AMENDED DISSENT
STATE OF ARIZONA, *et al.*, *Petitioners,* vs. ASH GROVE CEMENT COMPANY, *et al.*, *Respondents.*	No. 81-8079

The dissent in the court's order of October 30, 1981 is amended to read as follows:

Judge Boochever would grant permission to appeal under 28 U.S.C. § 1292(b) or in the alternative would permit a direct appeal under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *see In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, No. 80-5970, et al., slip op. at 5155 (9th Cir. October 13, 1981), but because no such permission has been granted concurs in the remainder of the order.

Robert Boochever

United States Circuit Judge

FILED
JAN 26 1982
CLERK, U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CEMENT ANTITRUST LITIGATION
(MDL No. 296)

STATE OF ARIZONA, *et al.*,
Plaintiffs-Appellants,
vs.
IDEAL BASIC INDUSTRIES, *et al.*,
Defendants-Appellees.

No. 81-5481

STATE OF ARIZONA, *et al.*,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,
and
KAISER CEMENT AND GYPSUM CORPORATION, *et al.*,
Real Parties in Interest.

No. 81-7465

STATE OF ARIZONA, *et al.*,
Petitioners,
vs.
ASH GROVE CEMENT COMPANY, *et al.*,
Respondents.

No. 81-8079

ORDER

BEFORE: WALLACE and BOOCHEVER, Circuit Judges.

Petitioners-appellants' motion for leave to file a petition for reconsideration out of time is granted. The petition attached to the motion is ordered lodged with the court.

An opinion expanding the views summarily expressed in the order filed October 30, 1981, will be filed on January 27, 1982. Petitioners-appellants may have seven (7) days from the date of filing of said opinion to file a new petition for rehearing if petitioners-appellants care to do so. If not, the petition heretofore lodged will be ordered filed.

FILED
APR 15 1982
PHILLIP B. WINBERRY
CLERK COURT
OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CEMENT ANTITRUST LITIGATION
(MDL No. 196)

STATE OF ARIZONA, *et al.*,
Plaintiffs-Appellants,

vs.

IDEAL BASIC INDUSTRIES, *et al.*,
Defendants-Appellees.

No. 81-5481

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

and

KAISER CEMENT AND GYPSUM CORPORATION, *et al.*,
Real Parties in Interest.

No. 81-7465

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

ASH GROVE CEMENT COMPANY, *et al.*,
Respondents.

No. 81-8079

AMENDMENT OF OPINION AND DENIAL OF REHEARING

BEFORE: WALLACE, SKOPIL, and BOOCHEVER, Circuit Judges.

The Opinion filed in the above matter on January 27, 1982, is amended as follows:

Following the sentence, "In conclusion, ... recusal decision," on page 602 of the slip opinion, first column, first full paragraph, footnote 5 is added as follows:

> We do not imply that issues collateral to the merits may never properly be the subject of a section 1292(b) appeal. This is only one factor that should be considered in determining whether permitting an appeal would materially affect the outcome of the litigation. We have allowed section 1292(b) appeals on issues that are clearly collateral to the merits. *See, e.g., Lear Siegler, Inc.* v. *Atkins,* 330 F.2d 595 (9th Cir. 1964); *United Air Lines, Inc.* v. *Wiener,* 286 F.2d 302 (9th Cir. 1961). In each instance, however, "exceptional circumstances" justified the departure from the basic policy of postponing appellate review until after the entry of a final judgment. *See Coopers & Lybrand, supra,* 437 U.S. at 475.

A majority of the panel as constituted above has voted to deny the petition for rehearing. Judge Boochever would grant a panel rehearing. The panel has voted unanimously to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JUDICIAL PANEL ON
MULTIDISTRICT
LITIGATION
FILED

MAR 2, 1982

PATRICIA D. HOWARD
CLERK OF THE PANEL

DOCKET NO. 296
BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION

ORDER DEFERRING DECISION

The Panel previously centralized several actions in this litigation before the Honorable C. A. Muecke in the District of Arizona for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Cement and Concrete Antitrust Litigation,* 437 F. Supp. 750 (J.P.M.L.1977); 465 F. Supp. 1299 (J.P.M.L. 1979). Defendants in this litigation have moved the Panel, pursuant to 28 U.S.C. § 1407(b), for an order reassigning the actions in this litigation to another transferee judge.

Defendants' motion was prompted by Judge Muecke's order, filed on May 26, 1981, recusing himself from the *Cement* portion of this litigation pursuant to 28 U.S.C. § 455(b)(4). Plaintiffs in this litigation have sought review of Judge Muecke's ruling in the United States Court of Appeals for the Ninth Circuit, and plaintiffs' petition for a writ of mandamus has been briefed and orally argued before the Ninth Circuit.

IT IS THEREFORE ORDERED that further consideration of defendants' motion for reassignment be, and the same hereby is DEFERRED until plaintiffs' mandamus petition pending in the Ninth Circuit has been resolved.

FOR THE PANEL:

Andrew A. Caffrey

ANDREW A. CAFFREY
Chairman

STATUTORY PROVISIONS

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

List of Respondents, Other Defendants, Their Parents, Affiliates and Subsidiaries.

Alamo Cement Corp.

Alpha Portland Industries, Inc.
- Alpha Portland Cement Company
- Leemilt's Petroleum Inc.
- Power Test Petroleum Distributors
- Kimco Corporation
- State Farm Mutual Automobile Insurance Co.

Amcord, Inc.
- Hercules Cement Company
- Phoenix Cement Company
- Riverside Cement Company

Arkansas Cement Corp.

Arkansas-Louisiana Gas Co.

Ash Grove Cement Co.
- Fordyce Concrete Company

Atlantic Cement Co.
- Newmont Mining Co.

California Portland Cement Company
- Arizona Portland Cement Company
  - Arizona Sand and Rock Company
  - California Cement Shake Co., Inc.
  - Pacific Prestressed Products, Inc.
  - Arizona Prestressed Concrete Company
  - Southeast Prestressed Concrete Products, Inc. (dissolved)
  - Spancrete of California
  - Triangle Rock Products, Inc.

Canada Cement La Farge

Capitol Aggregates, Inc., its parent
- H.B. Zachry Company, its Capitol Aggregates, Inc. Austin Division, and the following affiliated business entities:
  - Bexar Exporting, Inc.
  - Canyon Creed Railway, Inc.

Construction Modules, Inc.
H.B. Zachry Co. (Carribean)
H.B. Zachry Co. (International)
Zachry Construction, Ltd.
Constructora Zachry de Mexico, S.A. de C.E.
Zachry International, Inc.
Zachry Overseas Construction, Inc.
Zachry of San Antonio, Inc.
Zachry of Texas, Inc.

Centex Corp.
Centex Cement Corp.
Centex Materials, Inc.
Illinois Cement Co., Inc.
Matthews Ready-Mix, Inc.
Nevada Cement Co.

Citadel Cement Corp.

Columbia Cement Corp., and its parent,
Filtrol Corporation

Coplay Cement Mfg. Co., and its former subsidiary
Nazareth Cement Co.

Crane Corp.

Cyprus Hawaiian Cement Corp.

Dundee Cement Co.
Santee Portland Cement Company
"Holderbank" Financiere Glaris, Ltd.
Independent Cement Corp.
St. Lawrence Cement, Inc.

F. Ili Buzzi S.p.A. Cementi

General Portland, Inc.
Trinity Concrete Products
Pacific Western Industries, Inc.
General Processing, Inc. (formerly Rackle Company of Texas)

Genstar, Ltd.

Giant Portland Cement Co.

Giant Portland Masonry & Cement Co.

H. K. Porter Co.

Gifford-Hill & Company, Inc.
- Gifford-Hill American, Inc.
- Gifford-Hill Portland Cement Co.
- Texas Concrete Works, Inc. of Waco
- Austin Concrete Works, Inc.
- Mission Concrete Pipe Co.
- Ready-Mix Concrete of Raleigh
- Concrete Supply Co.
- Concrete Materials of Georgia, Inc.
- Concrete Materials, Inc.
- Gifford-Hill Panhandle, Inc.
- Gifford-Hill Pipe Co.

Heidelberg Zement A.G.

Holderbank Financere Glaris, Ltd.

Ideal Basic Industries, Inc.
- Springland Associates
- Builders Supply Co. of Houston (its former

Kaiser Cement & Gypsum Corp.
- Glacier Sand & Gravel

Keystone Portland Cement Co.

Lehigh Portland Cement Co., its Kentucky and Florida Concrete Divisions
- Virginia Concrete Company, Inc. (its former subsidiary)

Lone Star Industries, Inc.
- Bangor Punta
- Companhia Nationale de Cimento Portland, S.A.

Lone Star Florida Pennsuco, Inc.
Lone Star Lafarge, Inc.
Lone Star Minorala, Inc.
National Building Centers, Inc.
NBC of Texas, Inc.
Davidson Case of Oklahoma, Inc.
Lindsley Lumber Company
G.M. Stewart Lumber Company
Ward & Harrington Lumber Company
Cashway, Inc.
Sun Lumber Company
W.E. Cooper Lumber Co.
Palmetto Quarries Company, Inc.
Pioneer Sand & Gravel Company
Portland Cement Co. of Utah
Southern Materials Company, Inc.
W.D. Haden Company
Wesco-Wamix, Inc.

Louisville Cement Co.
Bessemer Cement Company

Martin Marietta Corp.
Embecon (S.A.)(Pty.) Limited
Halcon Mining, Inc.
Immuebles Rentables, S.A. de C.V.
International Laser Systems, Inc.
Lane Mt. Silica Co.
Nisso Master Builders Co., Ltd.
Rio Quima S.A.
Tecnocarto, S.A. de C.V.
Traitments Techniques des Detones

Marquette Co.
Afram Films, Inc.
American Motion Picture Export Co. (Africa) Inc.
Amfac, Inc.
Aros A.P.A.

Associates Financial Services Limited
Austurienne New Jersey S.A.
Australian Finance and Securities Limited
Blackjack Mines Ltd.
Bliss Emua, S.A.
Blue Fame Music Corporation
Bonney Forge Vertriebs GmBH
Brazmount Music Corp.
Brown Company
Brunswick Corp.
CBF Fabrics, Inc.
Camino Gold Mines Limited
Canaries Cigar and Tobacco Company S.A.E.
Caribbean Barge Corporation
Casmo Mining, Ltd.
Cementos Nacionales, S.A.
Chinchilla Varona do Brasil, Limitada
Cluett Peabody & Co.
Cliref S.A.
Compagnia Italiana Simmons,
La Campagnie Africaine Simmons S.A.
La Compania Insular Tabacalera S.A.
Consul Music Corporation
Corporacion Turistica de Cibao, S.A.
Cuban Cigar Brands, N.V.
Dale & Gene Auto Parts, Inc.
Desilu Music Corp.
Esquire, Inc.
Entertainment Services (International) Ltd.
Friga-Bohn Iberica S.A.
Friga-Bohn S.A.
Future General Corporation
General Tire & Rubber Co.
B. F. Goodrich Co.
Grand Palais S.A.R.L.
Great Lakes Carbon Company of Canada, Ltd.

Gulf & Western Iberica S.A.
Gulf & Western Industries Inc.
Haughwood Limited
Holiday on Ice, Inc.
Hollywood Park Inc.
International Arena Productions B.V.
International Cigar Distributors N.V.
International Film Productions (IFP) N.V.
International Overseas Film Services
International Overseas Productions, Inc.
James River Corporation of Virginia
Johathan Logan, Inc.
Kennwest B.V.
La Financiere des Caraibes S.A.
Libbey Owens Ford Co.
Madison Square Garden Soccer, Inc.
Magicam, Inc.
Mobile Equipment International Limited
Mohasco Corp.
Musingwear, Inc.
National Steel Corp.
North Atlantic Investments N.V.
Par-Ed Music Corporation
Para-Andi Music Corporation
Para-Kim Music Corporation
Para-Nowgen Music Corporation
Para-Tal Music Corp.
Para-Thumb Music Corporation
Para-Tracs Music Corporation
Para-Wag Music Corporation
Pareafrance Films S.A.
Paramount Sound Systems Corporation
Paramount-Roy Rogers Mus[illegible] Co., Inc.
Pellevoysin S.C.I.
Piedmont Minerals Associates
Qit-Fer-Et Titane, Inc.
R. H. Dixon Auto Parts, Inc.
Richards Bay Iron and Titanium (Proprietary) Limited

Security First Group, Inc.
Security First Management Corporation
Sega Enterprises, Inc.
Senecran S.A.R.L.
79 Lead-Copper Company
Societe Anonyme Morocaine Simmons
Societe Anonyme des Accumulateurs A.M.E.
Societe Anonyme du Theatre de L'Avenue
Societe de Blancs de Zinc de la Mediterrance
Societe Marocaine de Galvanisation
J. P. Stevens & Co.
Supercines S.A.R.L.
T. F. de Mexico, S.A.
Tabacalera de Garcia, Ltd.
Talisman Sugar Corporation
Teakgrove Limited
Tisand (Proprietary)
Trans-World Tobacco S.A.
Valerco Limited
Wesbro Investments Ltd.
Wurlitzer Co.
Xcor International Inc.

Medusa Corp.
West Lafayette Concrete Products Corp. (its former subsidiary)

Missouri Portland Cement Company, and its former subsidiaries
Botsford Ready-Mix Company
Springfield Ready-Mix Company
Memphis Ready-Mix Company

Monarch Cement Company
Salina Concrete Products Corp.

Monolith Portland Cement Co.
Monolith Portland Midwest Company
Wyoming Construction Company
Stewart & Nuss, Inc.

National Cement Co., Inc.

National Gypsum Co.
- Binswanger Glass Company
- Gold Bond Building Products Division
- DMH Division
- Cement Division (formerly Huron Portland Cement Company and Allentown Portland Cement Company)
- Binning's Building Products Division
- Decorative Products Division
- Biscayne Decorative Products, Inc.
- American Olean Tile Company

Northwestern States Portland Cement Co.

OKC Corporation

Oregon Portland Cement Co.

Continental Steel Corp. (formerly Penn-Dixie Industries, Inc.)
- Former subsidiaries:
  - Guy H. James Construction Co.
  - Spancrete Northwest, Inc.
  - Hudson River Concrete Products Co.
  - Castle Chemical Corp.
  - Concrete Plank Co.
  - Consolidated Precast, Inc.
  - Penn-Dixie Chemical Co.
  - Perlite Concrete Corp.
  - Poretherm, Inc.
  - Tecfab, Inc.
  - Tecfab Industries

Portland Cement Association

River Cement Company, its former parent, the Missouri River Corporation, and its former subsidiaries,
- Richter Concrete Corporation
- Stewart Concrete and Materials
- John A. Denny & Sons

Societe des Cements Francasi

Societe de Anonymes des Cements Vicat

Standard Oil Company (Indiana)

Southwestern Portland Cement Co.
Southdown, Inc.

The Flinkote Co.
- Campanella Corporation
- Harry T. Campbell Sons' Co.
- Frontier Stone Products, Inc.
- Kosmos Portland Cement Co.
- Standard Materials Co.
- Stockton Building Materials Co.

United States Steel Corp., its Universal Atlas Cement Division, and its Bahama Cement Co. subsidiary

Valley Cement Industries, Inc.

Vigier Cement Ltd.

Whitehall Cement Mfg. Co.

Wyandotte Cement Inc.

State of California
Department of Justice
George Deukmejian
(PRONOUNCED DUKE-MAY-GIN)
Attorney General

3580 WILSHIRE BLVD
LOS ANGELES 90010
(213) 736-2304

July 23, 1981

Alexander L. Stevas, Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Alpha Portland Industries, Inc., et al.* v. *California, et al.* No. 80-2062

Dear Mr. Stevas:

By your letter of June 26, 1981, respondents have been granted an extension of time until August 7, 1981 within which to file a response opposing the petition for writ of certiorari in the above-entitled case. We hereby request a second extension on the two separate grounds stated below.

A. Respondents intend to file a separate motion along with the response to the petition for the writ of certiorari. This motion will be (1) to suggest recusal of the Chief Justice and certain Associate Justices; (2) to suggest the absence of a quorum; (3) to dismiss the petition for the writ of certiorari, and; (4) to affirm the judgment of the Court of Appeals.

Recusal will be suggested because the Chief Justice and Associate Justices Powell and Blackmun, or their wives or minor children, apparently are stockholders in certain corporations that are members of a class represented by respondents in the litigation to which the above-entitled case is ancillary, *In Re Cement & Concrete Antitrust Litigation,* MDL Docket No. 296, Master File No. CIV-76-488A-PHX-CAM, (D. Ariz.)

(hereinafter "M.D.L. 296")[1] The District Judge in M.D.L. 296 disqualified himself on May 26, 1981 pursuant to 28 U.S.C. § 455(b)(4) because his wife owns stock in certain members of a class totaling over 210,000 entities which purchased cement or cement-containing products within the United States between January 1, 1968 and December 31, 1976. Although we do not think this decision is correct,[2] if it is correct, the Chief Justice and the above named Associate Justices would have to consider disqualifying themselves from ruling upon the petition for certiorari.[3]

Preparation of that motion, and dissemination to all respondents for comments will require additional time, until September 8, 1981.

B. If Rule 28.1 is applicable, there is an additional problem which, unless relief from that Rule is granted, will require an extension of time. The class member list in M.D.L. 296 contains the names of over 210,000 putative class members, mostly corporations. That list by itself in computer print-out form is over four feet high. Rule 28.1 provides that "[a]ny document . . . filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation."

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[1] California filed an action in the District of Tennessee, Southern Division, specifically on behalf of all plaintiffs in M.D.L. 296 for transfer of grand jury materials from custody of that District Court to the District of Arizona for possible disclosure and use in M.D.L. 296. The decision authorizing transfer was appealed by petitioner herein to the Court of Appeals for the Sixth Circuit, and affirmed by that Court. Petitioner then filed the pending petition for writ of certiorari.

[2] *In Re Cement & Concrete Antitrust Litigation*, 1981-1 CCH Trade Cases ¶ 64,030 at 76,331 (D.Ariz. 1981). On June 9, 1981, respondents appealed that decision to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291, on June 15, 1981 petitioned that Court for permission to appeal pursuant to 28 U.S.C. § 1292(b), and have moved to consolidate those appeals. On July 20, 1981, respondents also petitioned that Court for a Writ of Mandamus.

[3] Judge Sandra O'Connor would also have to consider disqualifying herself should she become an Associate Justice because her husband is a senior partner in a lawfirm which represents certain petitioners in this case as well as defendants in M.D.L. 296.

The District Judge in M.D.L. 296 said he must disqualify himself because class members are "parties" within the meaning of 28 U.S.C. 455(b)(4). Since that same statute will be the basis of our motion, and since we will file the motion *and* our response to the petition for writ of certiorari "on behalf of" the 210,000 putative class members, it would seem from a literal reading of Rule 28.1 that we must file a separate list of all parent companies, subsidiaries and affiliates of each such corporate class member to comply with that Rule. If that is required, and we urge and hope that it is not, compliance with Rule 28.1 would be a massive undertaking and we would need an indefinite extension of time.

We would greatly appreciate advice as to compliance with that Rule in these circumstances. Can you determine whether Rule 28.1 is applicable, and if so, whether such an undertaking is required and whether you can grant the necessary extension of time? Or, should we seek relief from the Rule or its clarification from the Court?

Enclosed for your convenience are nine copies of this letter in the event you believe this matter should be brought to the attention of the Court.

Thank you for your consideration.

Very truly yours,

GEORGE DEUKMEJIAN
Attorney General

Peter K. Shack

PETER K. SHACK
Deputy Attorney General

PKS: la

Attachment: Certificate of Service